

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





76-2009

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA ex rel :  
Vincent Caputo, :  
Relator-Appellant :  
- against - :  
ROBERT J. HENDERSON, Superintendent :  
Auburn Correctional Facility, :  
Respondent-Appellee :  
-----x

B  
1/5

DOCKET NO. 76-2009

On Appeal from the United States District Court  
for the Eastern District of New York

APPENDIX FOR RELATOR-APPELLANT

JAMES J. McDONOUGH  
Attorney for Relator-Appellant  
Attorney in Charge  
Legal Aid Society of Nassau  
County, Criminal Division  
400 County Seat Drive  
Mineola, New York 11501



PAGINATION AS IN ORIGINAL COPY



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HON. HENRY J. LATHAM,  
HON. J. IRWIN SHAPIRO  
HON. JOHN P. COHALAN, JR.  
HON. MARCUS G. CHRIST  
~~RECEIVED~~  
~~RECEIVED~~  
HON. FRED J. MUNDER

Acting Presiding Justice,

Associate Justices

The People of the State of New York,

Respondent,

Vincent Caputo,

Appellant

Order on Appeal from  
Judgment of Conviction

In the above entitled action, the above named Vincent Caputo,  
defendant in this action, having appealed to this court from a judgment of the County

Court, Nassau County, rendered November 20, 1972, convicting  
him of attempted burglary in the third degree, upon a guilty  
plea, and imposing sentence;

and the said appeal having been submitted by Matthew Murashin,

Esq., of counsel for the appellant, and submitted by Julius E. Orenstein, Esq.,

of counsel for the respondent, and due deliberation having been had thereon; and upon this court's

decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby affirmed.

LATHAM, Acting P.J., COHALAN, CHRIST and MUNDER, JJ., concur.

SHAPIRO, J., dissents and votes to reverse and to remand the  
case to the County Court for repleading and further proceedings  
not inconsistent with his dissenting memorandum.

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Appeal by defendant from a judgment of the County Court, Nassau County, rendered November 20, 1972, convicting him of attempted burglary in the third degree, upon a guilty plea, and imposing sentence.

Judgment affirmed. No opinion.

LATHAM, Acting P.J., COHALAN, CHRIST and MUNDER, JJ., concur.

SHAPIRO, J., dissents and votes to reverse and to remand the case to the County Court for repleading and further proceedings not inconsistent herewith, with the following memorandum:

At the time of pleading guilty, defendant was informed by the court as follows: "There is a possibility of a sentence to a State prison for an indeterminate term, up to four years, a possibility of sentence to a County Jail for up to one year, the possibility of probation for a period of up to five years, a conditional discharge, and there is also a possibility of an unconditional discharge."

As a matter of law, however, the court could not, under the circumstances of this case, place defendant on probation, sentence him to the County Jail or give him either a conditional or unconditional discharge, since defendant admitted his addiction to drugs (Mental Hygiene Law § 81.21, former subd. [d], par. 2, former subd. [e]). Under the statute, the court could only sentence defendant to prison or a rehabilitation program, if available.

In this situation, defendant should have an opportunity to withdraw his plea of guilty when it appears that it was given in reliance upon an erroneous statement of law by the court.

MARCH 11, 1974

PEOPLE v CAPUTO (VINCENT)

158 E



2  
The People &c..

No. 58

Respondent.

Order affirmed in a memorandum.  
All concur.

Vincent Caputo.

vs.

Appellant.

Vincent Caputo.

Appellant.

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

## MEMORANDUM:

Critical to defendant's rights to be relieved of his plea of guilty is whether he was misled by the court's advice to him before his guilty plea was accepted. To establish reliance on the representations made to him he would have been required to show that he believed them and that he was not otherwise advised by his lawyer or anyone else before he pleaded guilty. He could have done this by a motion to vacate his plea or by way of a motion to vacate the judgment of conviction under CPL 440.10 supported by an affidavit or affidavits showing justifiable reliance. Since this was not done the order of the Appellate Division should be affirmed.

\* \* \* \* \*

Order affirmed in a memorandum. All concur.

A-3.

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PEOPLE OF THE STATE OF NEW YORK

—against—

VINCENT CAPUTO,

Defendant

HON. WILLIAM CAHN  
District Attorney  
Nassau County  
Mineola, New York

JAMES J. McDONOUGH, ESQ.  
Attorney for Defendant  
Legal Aid Society for  
Nassau County  
400 County Seat Drive  
Mineola, N.Y. 11501

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause.....	
Supporting Affidavits.....	
Answering Affidavits.....	
Reply Affidavits.....	
Affidavits/Exhibits.....	
Filed Papers.....	
Briefs: People's Petitioner's..... Defendant's Respondent's.....	
The foregoing papers numbered 1 to..... having been read on this motion.....	

The defendant, by his attorney, applies to the Court for an order vacating the judgment of conviction entered upon his plea of guilty on the ground that the judgment was procured by misrepresentation on the part of the Court. (CPL 440.10 (subd. 1(b))).

The facts underlying this application are not disputed. By indictment #35651, the Grand Jury of Nassau County accused the defendant of Burglary in the Third Degree and Criminal Possession of Stolen Property in the Second Degree. Initially, the defendant plead not guilty to these charges. However, on October 11, 1972, the defendant, through counsel, applied for permission to change his plea to guilty. Upon Court inquiry, the defendant first acknowledged his guilt of Attempted Burglary in the Third Degree and his desire



COU...  
#34651. (Minutes of Change of Plea at 5). Next, the following dialogue between the Court and the defendant took place:

" THE COURT: All right. Now, a conviction of course, carries with it other possibilities, the possibility of sentence, and I will tell you what the possibilities are here. First let me say that I am informed that you have been examined and reported to be addicted to narcotics or dangerous drugs, and you will have the right, at the time of sentence, to admit your addiction or to deny your addiction or to stand mute, if you prefer.

If you stand mute or you deny your addiction, then you will have the right to have a jury trial or a trial without a jury on the issue.

If you are found to be an addict, then there is a possibility of a sentence to the Narcotics Addiction Control Commission for an indeterminate term, up to 60 months.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: On the other hand, there is no requirement that you be sent there, but there is the possibility of a sentence under the Penal Law, instead of the Mental Hygiene Law; and I will tell you what those possibilities of sentence are.

There is a possibility of a sentence to a State prison for an indeterminate term, up to four years, a possibility of a sentence to a County Jail for up to one year, the possibility of probation for a period of up to five years, a conditional discharge, and there is also a possibility of an unconditional discharge.

Now, I make no promises of sentence to you, except that it will be within the limits that the law permits and in the discretion of the judge who passes sentence, probably myself, but other than telling you it was in the limits of the law, I make no promise. Do you understand that?

THE DEFENDANT: Yes." (Minutes of Change of Plea at 73).

The application was granted and the defendant plead guilty to Attempted Burglary in the Third Degree. On November 29, 1972, at the sentencing, the defendant admitted his addiction with the concurrence of counsel and neither he nor counsel accepted the Court's



imposed an indeterminate term of imprisonment not to exceed four years. There was no comment from the defendant or his counsel.

The defendant appealed his conviction alleging that his guilty plea had been obtained through misrepresentation by the Court. At the time of the instant sentence, Mental Hygiene Law §1.21 (subd. d(2)) provided that one found to be an addict and who was to be sentenced for a felony could only be sentenced to an indeterminate term of imprisonment not in excess of four years or to the care and custody of the Narcotics Addiction Control Commission for a period of sixty months. No other sentencing alternatives were available. On his appeal the defendant contended that the Court erred in advising him that there were other sentencing alternatives such as probation, conditional discharge, unconditional discharge and a definite alternate sentence in the County Jail, and that he relied on this misrepresentation in pleading guilty.

The Appellate Division affirmed the conviction without opinion but Justice Shapiro dissented, arguing that the Court's listing of unavailable sentence options was grounds for reversal. (People v. Caputo, 44 A D 2d 572). The Court of Appeals affirmed the Appellate Division but on the ground that the defendant's proper remedy was a motion to vacate judgment. (People v. Caputo, 36 N Y 2d 653). The defendant has now made that motion.

The defendant's argument rests upon a selective emphasis in reading the Court's remarks at the Change of Plea and a convenient skimming over of the procedural steps from change of plea to sentence. While, at the Change of Plea, the Court had information that the defendant might be addicted, he had not yet been adjudicated an addict either by his own admission or after a hearing. Therefore, the full range of sentence options for one pleading to a class E felony



The Court's recitation of these options was literally accurate.

The sentencing options were not narrowed until the time of sentence when the defendant, with the assistance of counsel, admitted his addiction. (Mental Hygiene Law 31.21 (subd. d(2))). It was the waiver of an addiction hearing and not the guilty plea which deprived the defendant of the sentence options and, on this record, there is no reason for believing that this waiver, made with the assistance of counsel, was anything but free and knowing. (See Matter of Daniel B., 27 N Y 2d 90; People v. Enns, 71 Misc 2d 1075).

Those cases in which it has been found that a misrepresentation by the Court induced a guilty plea have involved express promises with regard to sentence which were subsequently breached. (See People v. Glasby, 44 A D 2d 541; People v. Grausile, 42 A D 2d 920). Here the Court expressly repudiated any promise with regard to sentence so that any reliance by the defendant was unjustified.

The application is denied. (CPL 440.50 (subd. 4 (b))).

GRANTED

ENTER

Dated June 10th, 1975

DOUGLAS F. YOUNG

JCC

HAROLD W. McCONNELL

CLERK

PLEASE TAKE NOTICE THAT: The petitioner be and is hereby advised of his right to apply to the Appellate Division, Second Department for a certificate granting leave to appeal from this determination and upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, petitioner may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Such application for poor person relief will be entertained only if, as and when such permission or certificate is granted. 22A NYCRR Section 671.5.

Dated June 10th, 1975

A-7

DOUGLAS F. YOUNG



County Court : NASSAU COUNTY

THE PEOPLE OF THE STATE OF NEW YORK :

-against-

VINCENT CAPUTO,

Ind. 35651

Defendant. :

Mineola, New York  
October 11, 1972

B e f o r e :

HON. DOUGLAS YOUNG,

County Court Judge.

A p p e a r a n c e s :

ANGELO DELLI GATTI, ESQ.

Assistant District Attorney,

For the People

PAUL WERSHALS, ESQ.

For the Defendant

MINUTES OF CHANGE OF PLEA



THE CLERK: People against Vincent Caputo.

You are Vincent Caputo?

THE DEFENDANT: Yes.

THE CLERK: And you appear here with your attorney, Paul Wershals, is that correct?

THE DEFENDANT: Yes.

THE CLERK: Application?

MR. DELLI GATTI: Your Honor, the defendant is accused under indictment number 35651, of burglary in the third degree, criminal possession of stolen property in the second degree and possession of burglar's tools.

Pursuant to a conference held earlier this afternoon, between defense counsel Mr. Wershals, your law secretary, Mr. Gittleman, and myself, the People at this time would ask your Honor to allow this defendant to withdraw his previously entered plea of not guilty to this indictment and enter in stead a plea of guilty under the first count of the indictment, to attempted burglary in the third degree, a class E felony, in satisfaction of the indictment.

No promises or representations have been made



as to what your Honor will do with regard to sentence, and nothing has been done to induce the defendant into taking this plea.

We ask that any motions outstanding be withdrawn in the event that your Honor accepts the plea.

THE COURT: I will go over this with you, Mr. Caputo, make sure you understand what is going on and the effects of a plea of guilty.

You are charged, as you know, with burglary in the third degree, which is a class D felony, and a second count on the same indictment of criminal possession of stolen property in the second degree, which is a class E felony, and a third count, which is a class A misdemeanor, of possession of burglar's tools.

Now, it is proposed that you be allowed to withdraw your plea of not guilty and be allowed to plead guilty to a charge of attempted burglary in the third degree, a class E felony, in satisfaction of the three charges in that indictment.

Now, a plea of guilty has the same effect as being found guilty after a trial. It is a

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conviction. You will have a conviction added to your record, a conviction of a class E felony.

Do you understand that, if you plead guilty?

THE DEFENDANT: Yes.

THE COURT: And you have the right to a trial and we will give it to you, if you ask for it, and give you all the rights that go with it, which are quite substantial.

You will be tried by a jury and be represented by your counsel and you can't be compelled to testify against yourself and you can confront your accusers and have them cross examined, if you wish.

If you decide you want to plead guilty to this one count, in satisfaction of the indictment, that means you are saying you waive or give up your right to the trial.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And all the rights that go with it, is that right?

THE DEFENDANT: Yes.

THE COURT: Now, a plea of guilty has a



THE COURT: Cabaro versus Henderson.  
further significance. It means that you are admitting that you did commit the acts charged here, at least to the extent of the crime you are pleading to; and I am referring to the incident which happened on the 26th day of July of 1972, when you, and in company with Vito Bitista, and you and each of you, aiding and abetting each other, in Nassau County, in New York, entered the premises or remained unlawfully in the premises known as 237 Foster Avenue, Malverne, with the intent to commit a crime at that time.

Do you know the incident I refer to?

THE DEFENDANT: Yes.

THE COURT: And did that happen substantially as I just stated it?

THE DEFENDANT: Yes.

THE COURT: And you were there and you knew what was going on, is that correct?

THE DEFENDANT: Yes.

THE COURT: And you had a criminal intent when you went in there, is that right?

THE DEFENDANT: Yes.

THE COURT: I assume it was to commit a



larceny? In other words, to steal something, is that right?

THE DEFENDANT: Yes.

THE COURT: And you are not arguing or contesting the fact that you are guilty, at least of an attempted burglary?

THE DEFENDANT: No.

THE COURT: You are admitting it, in other words?

THE DEFENDANT: Yes.

THE COURT: All right. Now, a conviction, of course, carries with it other possibilities, the possibility of sentence, and I will tell you what the possibilities are here. First let me say that I am informed that you have been examined and reported to be addicted to narcotics or dangerous drugs, and you will have the right, at the time of sentence, to admit your addiction or to deny your addiction or to stand mute, if you prefer.

If you stand mute or you deny your addiction, then you will have the right to have a jury trial or a trial without a jury on the issue.



If you are found to be an addict, then there is a possibility of a sentence to the Narcotics Addiction Control Commission for an indeterminate term, up to 60 months.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: On the other hand, there is no requirement that you be sent there, but there is the possibility of a sentence under the Penal Law, instead of the Mental Hygiene Law; and I will tell you what those possibilities of sentence are.

There is a possibility of a sentence to a State prison for an indeterminate term, up to four years, a possibility of sentence to a County Jail for up to one year, the possibility of probation for a period of up to five years, a conditional discharge, and there is also a possibility of an unconditional discharge.

Now, I make no promises of sentence to you, except it will be within the limits that the law permits and in the discretion of the judge who passes sentence, probably myself, but other

*if he is an addict  
is all this possible?*



than telling you it was in the limits of the law,  
I make no promise. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If anyone else has made any  
promise, whether it be your lawyer or a police  
officer or anybody else, it doesn't mean anything;  
and if an assistant district attorney made any  
promise to you, it doesn't mean anything. Do  
you understand that?

THE DEFENDANT: Yes.

THE COURT: So I ask you now, in the light  
of what I have told you, if it is your wish to  
plead guilty to this class E felony, rather than  
to stand trial on the indictment?

THE DEFENDANT: Yes.

THE COURT: And have you had an opportunity  
to think it over carefully and discuss it with  
your lawyer and make up your mind?

THE DEFENDANT: Yes.

THE COURT: You feel it is in your own best  
interests to plead guilty?

THE DEFENDANT: Yes.

THE COURT: Has anybody threatened you or



forced you to get you to do this?

THE DEFENDANT: No.

THE COURT: Any questions you would like to ask me about it?

THE DEFENDANT: No.

THE COURT: Your application to withdraw your plea is granted.

THE CLERK: Vincent Caputo, the Court has directed me to inform you of your right to the aid of legal counsel throughout all stages of these proceedings. At this time you wish to withdraw your plea of not guilty heretofore entered and enter a plea of guilty to attempted burglary in the third degree, a class E felony, in satisfaction of this indictment, is that correct?

THE DEFENDANT: Yes.

THE CLERK: Is that correct, Mr. Wershals?

MR. WERSHALS: Yes, it is.

THE CLERK: Plea of guilty, your Honor.

MR. WERSHALS: Your Honor, I have one slight application. In view of the adjudication as to the defendant's being a drug user, I would



respectfully request that the Court see to it,  
if it is possible, that he be committed to the  
drug tier section of the Nassau County Jail  
pending the sentence investigation.

THE COURT: I will make a request of the  
warden that he be considered for the drug tier,  
and that will be up to the warden, to make that  
determination.

MR. WERSHALS: Thank you.

THE COURT: I will set Wednesday, November  
22 for sentence.

MR. WERSHALS: Your Honor, that would be a  
very bad day for me. Could it be earlier that  
week? Could it be a Monday? Would that be possible?

THE COURT: Yes, I will set Monday, the 20th,  
9:30 a.m.

MR. WERSHALS: Thank you, your Honor, that's  
fine.

THE CLERK: November 20th, your Honor?

THE COURT: Yes.

THE CLERK: Defendant remanded?

THE COURT: The defendant is remanded.

MR. WERSHALS: 9:30?

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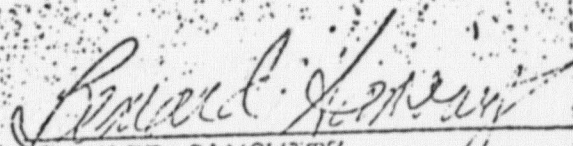
THE COURT: Yes.

MR. WERSHALS: Thank you.

THE COURT: You're welcome.

\* \* \*

I certify that the foregoing is a true  
and accurate transcript.

  
BERNARD SAMOWITZ  
Official Court Reporter



COUNTY COURT : NASSAU COUNTY

PART II

----- x  
THE PEOPLE OF THE STATE OF NEW YORK :

-against-

: Ind. #35651

VINCENT CAPUTO,

:  
Defendant. :  
----- x

Mineola, New York  
November 20, 1972

B e f o r e :

HON. DOUGLAS F. YOUNG, County Court Judge

Appearances:

MARTIN WEINBERG, ESQ.,  
Assistant District Attorney  
for the People

PAUL L. WERSHALS, ESQ.,  
for the Defendant

-----  
MINUTES OF SENTENCE  
-----

LEONARD FERRO, CSR  
Official Court Reporter



MR. RICH: Indeterminate sentence  
2  
THE CLERK: People against Vincent Caputo.

You are Vincent Caputo?

THE DEFENDANT: Yes.

THE CLERK: You appear here with your attorney, Paul L. Wershals; is that correct?

THE DEFENDANT: Yes.

THE CLERK: Vincent Caputo, do you wish to make a statement before judgment is pronounced against you?

THE DEFENDANT: No.

THE CLERK: Do you, Mr. Wershals?

MR. WERSHALS: Yes, I do. Your Honor, would it be possible for me to approach the Bench?

THE COURT: I beg your pardon?

MR. WERSHALS: May I approach the Bench?

THE COURT: Yes, you may with the District Attorney.

(Conference at Bench not within the hearing of the reporter.)

THE COURT: Counsel, I am going to give you and the defendant and the District Attorney of course each an opportunity of saying anything he wishes with respect to sentence, but before I



MP KRAM7. 3  
do, we have a report that the defendant is addicted to narcotics or drugs as I think you know and has been previously stated, the defendant has a right to deny his addiction, to stand mute and/or in the alternative, admit to his addiction.

In the event he either stands mute or denies his addiction, then he is entitled to a hearing on the question of addiction either by a jury or before the Court alone.

So I ask the defendant now and you on his behalf what position he takes? What is it, Mr. Caputo?

THE DEFENDANT: I'm addicted to drugs.

THE COURT: You admit to being an addict?

THE DEFENDANT: Yes.

THE COURT: You agree, is that right, Mr. Wershals?

MR. WERSHALS: I do, your Honor.

THE COURT: All right. Now, with respect to sentence, does the defendant wish to say anything to the Court on the subject of sentence?

THE DEFENDANT: No.

THE COURT: Nothing?

THE DEFENDANT: No.

THE CLERK: Mr. Wershals?



4

MR. WERSHALS: Yes. In the interest of justice, your Honor, in view of the defendant's admission to addiction, I would respectfully ask this Court in the exercise of its very sound discretion to commit him pursuant to Section 207 of the Mental Hygiene Law, a civil commitment so that he could continue to get proper treatment for his addiction.

THE COURT: Is that all?

MR. WERSHALS: That is all.

THE COURT: All right. Mr. Weinberg?

MR. WEINBERG: The People have no comment.

THE COURT: Well, I have given consideration to the possibility of a sentence to the Narcotic Addiction Control Commission but I don't think it is an appropriate sentence in this case and consequently I will sentence the defendant under the terms of the Penal Law.

It is the judgment of this Court that based on your conviction that you be sentenced to the Department of Correction at the Ossining Correctional Facility, Sing Sing at Ossining, New York for an indeterminate term not to exceed four years.



Counsel, you are instructed to inform the defendant in writing of his right to appeal and his right to have the expenses of the appeal paid in the event he is unable to afford it.

MR. WERSHALS: Thank you, sir.

\* \* \*

I hereby certify that the above is a true and accurate transcript.

*Leonard Ferro*

Leonard Ferro, CSR

*By M. W. W.*

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1  
2 UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF NEW YORK

4 -----X  
5 CAPUTO, :

6 Plaintiff :

7 against :

75 C 1614

8 HENDERSON :

9 Defendant :

10 -----X

11  
12 United States Courthouse  
13 Brooklyn, New York

14 December 5, 1975  
4:15 p.m.

15 B e f o r e :

16 HONORABLE JACK B. WEINSTEIN,

17 U.S.D.J.  
18  
19  
20  
21  
22  
23

24 SHELDON SILVERMAN  
25 Court Reporter



1                   **Appearances:**  
2

3                   **ALLEN KRANZ, Esq.**  
4                               **and**  
5                   **LOUIS J. LEFKOWITZ, Esq.**  
6                   **Attorneys for Petitioner**

7                   **DAVID BIRCH, Esq.**  
8                               **and**  
9                   **MS. ARLENE SILVERMAN**  
10                   **Attorneys for Respondent**  
11  
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1 THE CLERK: Caputo versus Henderson.

2 THE COURT: I'll hear your witnesses.

3 MR. BIRCH: At this time we would ask the  
4 second witness be excused.

5 THE COURT: If you're here as a witness, Mr.  
6 Wershals, you'll have to be excused.

7 MR. KRANZ: At this time the petitioner calls  
8 Mr. Caputo.

9  
10 V I N C E N T C A P U T O, called as a witness,  
11 having been duly sworn by the Clerk of the Court,  
12 testified as follows:

13 THE CLERK: Full name.

14 THE WITNESS: Vincent Caputo.

15 DIRECT EXAMINATION

16 BY MR. KRANZ:

17 Q Do you recall the hearing before the Honorable  
18 Douglas Young, in Nassau County Court on October 11, 1972?

19 A Yes.

20 Q Do you recall entering a guilty plea to an  
21 attempted burglary in the third degree of that appearance?

22 A Yes.

23 Q I ask you, do you recall at this time what  
24 sentencing alternatives the judge told you were available  
25 if you were to plead guilty to attempted burglary and admit



addiction to drugs?

A One year in the county jail, probation, conditional discharge, probation, up to five years.

THE COURT: Five years, maximum of five years?

THE WITNESS: Or probation.

Q Do you recall any other sentencing alternatives?

A N.A.C.C., Narcotics Control Commission.

MR. KRANZ: I would like to give the witness an affidavit which he signed, this affidavit, and allow him to use it if he can to refresh his recollection of the events of that day.

THE COURT: All right.

Q Mr. Caputo, will you view that and once again, tell the Court if you recall what sentencing alternatives the judge told you were available if you were to plead guilty to attempted burglary, admit addiction to drugs.

A Possibility of sentencing to the N.A.C.C. for a period up to 60 months, term of jail term, maximum four years.

MS. SILVERMAN: I'm sorry, I missed that.

THE WITNESS: Maximum of four years.

THE COURT: Speak up. He has to take it on the machine.



1  
2           A       Definite sentence of one year, conditional  
3 discharge and unconditional discharge, probation for a  
4 period of up to five years.

5           Q       Mr. Caputo, what sentence were you hoping  
6 to get at that particular time?

7           A       Sentence of one year.

8           Q       One year sentence; is that correct?

9           A       Yes.

10          Q       When you heard the sentencing alternatives  
11 given to you by the judge, did you believe all these  
12 alternatives were available to you?

13          A       Yes.

14          Q       Did anyone at any time prior to your entry of  
15 a guilty plea, advise you that all those alternatives were  
16 not available to you?

17          A       No.

18          Q       Did you have any other reason to believe that  
19 all those alternatives were not available to you?

20          A       No.

21          Q       Mr. Caputo, were you addicted to drugs at  
22 the time you entered your plea of guilty?

23          A       Yes.

24               MR. KRANZ: Your Honor, the Attorney General  
25 and I at this time will stipulate, agree to stipulate



1  
2 that on October 4, 1972, Mr. Caputo was examined  
3 at the Nassau County Jail by a Dr. Galati and found  
4 to be addicted to drugs. I have no further ques-  
5 tions of this witness.

6 CROSS EXAMINATION

7 BY MR. BIRCH:

8 Q Mr. Caputo, is it not true that before you  
9 went into the courtroom on October 11th, 1972, to plead  
10 guilty, that you had a conversation with your attorney,  
11 Mr. Wershals?

12 A Yes.

13 Q Isn't it true Mr. Wershals told you that if  
14 you pleaded guilty that you would be subject to a possible  
15 jail term of up to four years?

16 A No.

17 Q I refer you to the affidavit that Mr. Kranz  
18 recently showed you. Isn't it true that there you stated  
19 that "In discussing the possibility of entering a guilty  
20 plea to this lesser charge, Mr. Wershals informed me if  
21 I admitted my addiction to drugs, I would be subject to a  
22 possible indeterminate jail term with a maximum of four  
23 years"?

24 A No.

25 Q No, you did not make that statement? You do



Caputo-cross

not remember making that statement?

A I was trying to get into a drug program,  
trying to get into the N.A.C.C. program.

THE COURT: Show him his affidavit.

(Said document shown to Mr. Caputo.)

A Yes, he told me.

Q He told you that?

A Yes.

Q If you admitted your addiction you could get  
up to four years?

A Yes.

Q Isn't it true that before you went into the  
courtroom to plead guilty in front of Judge Young, that you  
had decided to plead guilty?

A I still had doubt that day I might change my  
mind.

Q Isn't it true that on September 26, 1972, you  
signed a statement to Detective -- or gave a statement to  
Detective Moore, Patrolman Richali (phonetic) admitting  
that you had broken into a house?

A Yes, I signed this statement.

Q And that this was the house that you were  
breaking into, was to involve the charge that you eventually  
pleaded guilty to in front of Judge Young; is that correct?



1  
2 A Yes.

3 Q Isn't it true you were arrested at the scene  
4 coming out of the door of this house?

5 A No. I was arrested in the yard.

6 Q In the yard outside of the house?

7 A Yes.

8 THE COURT: What was he charged with?

9 MR. BIRCH: Burglary in the third degree,  
10 criminal possession second degree and possession  
11 of burglar's tools.

12 THE COURT: What are the penalties for those  
13 crimes, or were there at the time?

14 MR. BIRCH: The greatest was seven years as  
15 a D felony.

16 THE COURT: What about the others?

17 MR. BIRCH: The lesser, I'm not sure.

18 THE COURT: What was the maximum consecutive  
19 term that he could have gotten?

20 MR. BIRCH: I'm not sure of that.

21 MR. KRANZ: They would have to run concurrently,  
22 all parts of the same acts.

23 THE COURT: Zero to seven would be the maxi-  
24 mum.

25 MS. SILVERMAN: Possession of burglar's tools



1  
2 would necessarily blend in with the others.

3 MR. KRANZ: It would depend upon the  
4 circumstances, if they were discovered at another  
5 location, possibly not, but discovered together at  
6 the same time as he was apprehended, then I think  
7 they would be.

8 THE COURT: What kind of record did he have?

9 MR. BIRCH: Prior convictions.

10 THE COURT: For what?

11 THE WITNESS: Possession of hypodermic  
12 needle and possession of heroin.

13 THE COURT: How much had you gotten before?

14 THE WITNESS: Nine months, six months.

15 THE COURT: Nine months and six months.

16 THE WITNESS: There was quite a few of them,  
17 your Honor.

18 THE COURT: How many?

19 THE WITNESS: About eighteen.

20 THE COURT: Eighteen sentences of nine months  
21 and six months?

22 THE WITNESS: Eighteen arrests.

23 THE COURT: Only two sentences to jail?

24 THE WITNESS: I did about two in jail.

25 THE COURT: One for nine and one for six months.



1  
2 THE WITNESS: Yes, and one in the N.A.C.C.

3 THE COURT: You also had an N.A.C.C.?

4 THE WITNESS: For possession of hypodermic  
5 needles.

6 THE COURT: How much time did you spend there?

7 THE WITNESS: Forty months.

8 THE COURT: You may continue.

9 CROSS EXAMINATION (CONTINUED)

10 BY MR. BIRCH:

11 Q Isn't it true, Mr. Caputo, when you pleaded  
12 guilty the Court said to you, "And have you had an oppor-  
13 tunity to think it over carefully and discuss it with your  
14 lawyer, make up your mind?" You said, "Yes"?

15 The Court said, "You feel it is in your own  
16 best interest to plead guilty?"

17 You said, "Yes."

18 The Court said, "Has anybody threatened you  
19 or forced you to get you to do this?"

20 You answered, "No."

21 Do you remember that?

22 A Yes.

23 THE COURT: What were the sentencing alterna-  
24 tives after he did plead and after he admitted he  
25 was an addict?



1  
2 MR. BIRCH: Indeterminate sentence up to four  
3 years or commitment to the Narcotics Addiction Con-  
4 trol Commission.

5 THE COURT: Could they have given an indeter-  
6 minate sentence of less than zero to four?

7 MR. BIRCH: Could have been zero to three.

8 MR. KRANZ: That's all, those are the only  
9 alternatives available along with Narcotics Addic-  
10 tion Control Commission.

11 THE COURT: That would have been up to sixty  
12 months.

13 MR. KRANZ: Up to sixty months.

14 THE COURT: What does zero to three and zero  
15 to four mean? Does it mean the Parole Board can  
16 let him out any time?

17 MR. KRANZ: Under the law, I believe up to,  
18 spend at least twelve months at the state correc-  
19 tional facility before you're eligible for parole,  
20 before you reach parole the first time.

21 MS. SILVERMAN: You meet the Parole Board  
22 the ninth or tenth month.

23 THE COURT: What's the normal practice?

24 MR. KRANZ: As far as what is concerned?

25 THE COURT: As far as parole.



1  
2 MR. KRANZ: Depends upon the prior record  
3 as to consideration.

4 MR. BIRCH: Also depends upon your conduct  
5 in prison, chances for rehabilitation.

6 THE COURT: How long have you been in now?

7 THE WITNESS: Now I'm down a year. I did  
8 twenty months the first time and now I'm down a year.

9 THE COURT: I don't understand.

10 MR. BIRCH: If I may, your Honor, I believe  
11 he was paroled on this charge.

12 THE COURT: After how long?

13 THE WITNESS: Twenty months, nineteen and  
14 a half.

15 THE COURT: Then you violated your parole?

16 THE WITNESS: Yes.

17 Q You were also convicted?

18 A No, violation.

19 THE COURT: Continue.

20 Q Isn't it true that when the Court said,  
21 "Have you had an opportunity to think it over carefully,  
22 discuss it with your lawyer, make up your mind?" you  
23 answered it "Yes"? Isn't it true that you had pretty much  
24 decided to plead guilty before you came into the court-  
25 room that day after you discussed this with your lawyer?



1  
2 A Yes.

3 THE COURT: You said "yes"?

4 THE WITNESS: I had most of my -- I was going  
5 to plead guilty that day but I still had a doubt,  
6 though.

7 Q When the Court sentenced you on November 20th,  
8 1972, isn't it true that you didn't express surprise?

9 A You mean saying anything -- yes, I didn't  
10 say nothing.

11 MR. BIRCH: No more questions, your Honor.

12 REDIRECT EXAMINATION

13 BY MR. KRANZ:

14 Q Mr. Caputo, you heard the Assistant Attorney  
15 General, Deputy Assistant Attorney General, ask you whether  
16 you recalled certain questions and answers given by the Court,  
17 to which you responded; one in particular, "Have you had an  
18 opportunity to think it over carefully and discuss it with  
19 your lawyer, make up your mind?"

20 The defendant replies, "Yes."

21 You told the Deputy Assistant Attorney General  
22 that you recall that, correct?

23 A Yes.

24 Q At that particular time did you feel you could  
25 get one year jail sentence?



1  
2 A Yes.

3 MR. KRANZ: No further questions.

4 THE COURT: Call your next witness.

5 MR. KRANZ: Mr. Wershals.

6  
7 P A U L W E R S H A L S, called as a witness, having  
8 been duly sworn by the Clerk of the Court, testified  
9 as follows:

10 THE CLERK: Full name.

11 THE WITNESS: Paul L. Wershals. My office  
12 is located No. 10 Cutter Mill Road, Great Neck,  
13 New York.

14 DIRECT EXAMINATION

15 BY MR. KRANZ:

16 Q Mr. Wershals, did you represent the petitioner  
17 in this particular action, Mr. Caputo, Nassau County Court,  
18 Indictment No. 34651, 1972?

19 A Yes.

20 Q Can you now recall the charges that you  
21 represented him for?

22 A I believe the defendant was charged with third  
23 degree burglary, possession of burglar's tools, and posses-  
24 sion of a stolen vehicle.

25 Q Did you subsequently discuss with Mr. Caputo



1  
2 the possibility of pleading guilty to a lesser offense?

3 A I did.

4 Q Can you now recall what advice you gave him  
5 regarding the consequences of his pleading guilty to a  
6 lesser charge?

7 A Yes, I told the defendant that if we were  
8 able to plead to a lesser charge, that he would be subjected  
9 to an indeterminate term of up to four years imprisonment  
10 or an indeterminate term with respect to the Narcotics  
11 Commission.

12 ✓ Q Did you ever tell Mr. Caputo he couldn't  
13 - get one year in the county jail, conditional or unconditional  
14 charge or probation if he pled guilty to attempted burglary--

15 A No.

16 Q Never told him that?

17 A No.

18 ✓ Q Do you recall if you ever told him that he  
19 could get one year in the county jail?

20 ✓ A I don't recall.

21 ✓ Q You don't recall.

22 A (No response)

23 ✓ Q Is it possible you might have?

24 ✓ A It's possible but I really don't have any  
25 fresh recollection of that.



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Q Do you recall the Court advising him on October 11th, 1972, that a change of plea proceeding when he entered the guilty plea, that he could receive one year in the Nassau County Jail, conditional or unconditional discharge, or probation if he pled guilty to attempted burglary and admitted drug addiction?

A Yes, I did.

Q Did you ever tell Mr. Caputo the judge was in error when he told him he could get one year--

A No, I did not, because I relied upon the judge at that time. I was not aware that an error might have been made by the judge.

Q Mr. Wershals, are you aware of anyone else advising Mr. Caputo the Court was in error on that particular day with regard to the sentencing alternatives that were then available?

A No, I do not.

Q Did you yourself realize at that time that the Court had made an error?

A No, I did not.

Q You did not.

MR. KRANZ: No further questions.

CROSS EXAMINATION

BY MR. BIRCH:



1  
2 Q Mr. Wershals, isn't it true that before going  
3 into the courtroom sometime before going into the courtroom  
4 on October 11th, 1972, that you told Mr. Caputo that a  
5 Class E felony conviction carries with it a maximum in-  
6 determinate sentence of four years?

7 A I do not honestly recall.

8 Q I show you this affidavit that you prepared  
9 for the State Court and signed, the end of paragraph 2  
10 (indicating to witness).

11 Does that refresh your recollection?

12 A Yes.

13 Q Now you do recall?

14 A Yes.

15 Q Do you recall now informing the defendant that  
16 in your opinion the Court would impose an indeterminate  
17 sentence with the maximum of three or four years?

18 A Yes, I do.

19 Q Isn't it true before you went into the court-  
20 room that day you went in with the intention of pleading  
21 your client guilty?

22 A (No response)

23 Q Or having him plead guilty?

24 A I don't recall.

25 Q Were you planning starting a trial that day?



1  
2 A I don't recall.

3 Q You don't recall why you went into the court-  
4 room that day?

5 A Which--

6 Q On October 11th--

7 A Is that the day set for sentencing?

8 Q No, the date the plea--

9 A I do not recall, sir.

10 Q Can you tell the Court how the discussions  
11 for reduced plea came up?

12 A To the best of my recollection, I'm guessing,  
13 I want to make this very clear, they would come up as  
14 they would come up in any criminal proceeding where a  
15 conference would be had. I'm sure there was a conference  
16 conducted at that time, the various pleas available were  
17 discussed. Then subsequently, after I finished a conference  
18 I would have discussed this with my client. I can't honestly  
19 say that I remember my state of mind that morning on the  
20 date that you mentioned because I do not.

21 Q Isn't it true that you thought if your  
22 client received a sentence of three to four years after  
23 plea that would have been good; that he would have done  
24 well considering there was a confession, even caught at  
25 the scene of the crime?



1  
2 A Would you repeat that question, please,  
3 read that back to me?

4 Q (Pending question read.)

5 A I don't recall.

6 Q I show you the plea minutes and I direct  
7 your attention to where the District Attorney said, "No  
8 promises or representations have been made to what your  
9 Honor will do with regard to sentence, and nothing has  
10 been done to induce the defendant into taking this plea."

11 Do you recall that?

12 A Off the record for a second?

13 THE COURT: No.

14 A On the record, let me go on the record. To  
15 say that I can actually recall everything that was said in  
16 open court, I cannot. This is the type of procedure which  
17 is indicative of most procedures in criminal matters.  
18 I would say that I could recall that based upon my working  
19 knowledge as an attorney, but to say that I can actually  
20 recall this statement being made, I cannot honestly say  
21 that I remember it being said. This matter was consummated  
22 as far as my involvement with it was concerned, I believe  
23 over four years ago. .

24 Q Isn't it true that you didn't object, made no  
25 comment to the Court after the District Attorney made that



statement. You can look--

A I would have to read the minutes to answer that.

Q I show you the minutes then (handing to witness).

A You're correct.

Q Directing your attention to the very beginning.

A Very beginning of what?

Q These plea minutes. Isn't it true that you were in court to plead, to have your client plead guilty?

A I already answered that, I thought.

Q I direct your attention to the beginning of these minutes where the District Attorney--

A As a result of what happened in court that day, a plea was entered, a plea was withdrawn, and there was a new plea made. That's the answer.

Q Isn't it true your intention of coming there that day--

A I have answered that question already.

Q Isn't it true that you had discussed this--

A What?

MR. BIRCH: Withdrawn.

Q I direct your attention to the minutes of sentence which was entered on November 20th, 1972. I direct your attention to page A-10 of those minutes, to where you say at the beginning--



1  
2 A Page A-9.

3 Q "THE COURT: All right, with respect to sen-  
4 tence, does the defendant wish to say anything to the Court  
5 on the subject of sentence?

6 "THE DEFENDANT: No.

7 "THE COURT: Nothing?

8 "THE DEFENDANT: No.

9 "THE CLERK: Mr. Wershals--

10 "MR. WERSHALS: Yes. In the interest of justice,  
11 your Honor, I would specifically ask this Court  
12 in the exercise of its very sound discretion to  
13 commit him pursuant to Section 207 of the Mental  
14 Hygiene Law, a civil commitment, so that he can  
15 continue to get proper treatment for his addiction.

16 "THE COURT: Is that all?

17 "MR. WERSHALS: That is all."

18 Is it true that you said that?

19 A Yes.

20 Q Is it true that under Section 207 of the  
21 Mental Hygiene Law your client could have been committed  
22 to N.A.C.C. for up to 60 months?

23 A I don't recall. I'd have to look at the  
24 section.

25 THE COURT: It's so stipulated, isn't it?



1  
2 MR. KRANZ: 207 of the Mental Hygiene Law  
3 I don't think was in effect. I think it was 81.19,  
4 which would allow, which would be that type of  
5 commitment, yes.

6 THE COURT: Up to 60 months?

7 MR. KRANZ: Right.

8 Q Isn't it true that you thought the best deal  
9 that your client would get was a N.A.C.C. commitment, which  
10 would keep him incarcerated for sixty months, if that was  
11 on your mind?

12 A I do not recall.

13 Q Isn't it true that you did not make any plea  
14 for anything else with the judge, you did not suggest it  
15 to the judge that he conditionally release or discharge or  
16 give your client probation or--

17 A I do not recall.

18 Q Then I refer you to the sentencing minutes.

19 A Your question isn't necessarily limited to  
20 the minutes. As I recall, there was a conference and  
21 there were discussions held that no minutes were made of.  
22 My answer to your question is that I do not recall. I'm  
23 not going to limit the answer to my questions solely to  
24 what is contained in these minutes.

25 Q Isn't it true, though, in open court, when you



1  
2 knew a record was being made, you made no request for those  
3 lighter sentences?

4 A Forgive me.

5 (Pause)

6 A It's clearly indicated in the minutes on page  
7 A-8, that there was a conference at the bench which was  
8 held off the record which was not made part of these minutes.  
9 I do not recall and I'm repeating that, I do not recall  
10 what was said at the conference at the bench. Therefore,  
11 my answer to your question, again, is I'm not sure.

12 Q Would you answer my prior question that you  
13 have not answered?

14 A Let me understand the question then. It  
15 was referable to the contents of these minutes?

16 Q Right.

17 A Read back that original question.

18 THE COURT: No, rephrase it.

19 A Rephrase the question, please.

20 Q Isn't it true that in open court when you  
21 knew a record was being made, that you made no request to  
22 the Court for a sentence except of commitment to N.A.C.C.?

23 A Pursuant to the minutes I have seen before me,  
24 yes, but I want to go on the record to say that there was  
25 a conference at the bench which was not recorded, and I do  
not recall what was said at that conference.



MR. BIRCH: No further questions.

REDIRECT EXAMINATION

BY MR. KRANZ:

Q I would like to ask you again, Mr. Wershals, did you ever tell Mr. Caputo that a sentence of one year in the county jail, conditional or unconditional discharge or probation would not avail to him if he entered a plea of guilty to burglary in the third degree, was found to be addicted to drugs?

A No.

Q Mr. Wershals, are you aware of what the procedure as far as actual detention was in 1972 with regard to Narcotics National Control Commission?

A I believe I had some familiarity with it, yes, sir, at that time.

Q Do you recall or do you have knowledge now of what period of incarceration in the majority of those who are certified to the Commission, the amount of time they actually spend behind bars, are committed?

A My recollection -- this is recollection only -- I believe the Commission had it within their discretionary powers to determine the actual amount of time of incarceration. I don't know that I can honestly say that I recall the amount of time people who were committed to that program



1  
2 were spending today. I know that at that time of sentencing  
3 in this case, I was familiar, but I do not recall that today.

4 MR. KRANZ: No further questions.

5 THE COURT: What effect at the time did you  
6 think the maximum sentence in the alternatives were  
7 had he been convicted as charged; that the state  
8 proved him to be a narcotics addict?

9 THE WITNESS: Based upon my recollection,  
10 I think that it was four years, your Honor.

11 THE COURT: Four years.

12 MS. SILVERMAN: Are you talking about the  
13 indictment?

14 THE COURT: According to the indictment.

15 THE WITNESS: The original indictment? It  
16 was six or seven years.

17 THE COURT: If he had been found to be a  
18 narcotics addict, what alternatives?

19 THE WITNESS: My recollection tells me that it  
20 was an indeterminate term up to a period of--

21 THE COURT: Seven?

22 THE WITNESS: I don't think it was that long,  
23 your Honor. I don't honestly recall.

24 THE COURT: What is the law then?

25 MR. KRANZ: With regard to a D felony.



1  
2 THE COURT: If he had been convicted.

3 MR. KRANZ: If he had been convicted on the  
4 original indictment, indeterminate term, maximum of  
5 seven years.

6 THE WITNESS: On the original indictment -- on  
7 the plea.

8 THE COURT: Asking questions about the  
9 original indictment.

10 THE WITNESS: Seven years.

11 THE COURT: If he had been found to be a  
12 narcotics addict he would have to get zero to seven.

13 THE WITNESS: On the original indictment, yes.

14 THE COURT: No alternatives except N.A.C.C.?

15 THE WITNESS: That's my understanding.

16 THE COURT: There was no doubt in your mind  
17 that he was an addict, was there?

18 THE WITNESS: There was very little doubt in  
19 my mind that the defendant was not.

20 THE COURT: The evidence was overwhelming  
21 against him, wasn't it?

22 THE WITNESS: Yes, it was.

23 THE COURT: If he went to trial he would  
24 have been convicted?

25 THE WITNESS: Very good chance of it from my



1  
2 opinion.

3 THE COURT: Supposing he had come in that  
4 morning and the Court had told him, "If you go to  
5 trial you can get zero to seven or N.A.C.C. If you  
6 plead you can get zero to four or N.A.C.C." Would  
7 he have pleaded?

8 THE WITNESS: I would think my answer to that  
9 question would have been yes.

10 THE COURT: I think based on what I have  
11 heard that would have been the answer. I don't really  
12 believe there was any substantial error here. The  
13 error would not have affected the result at all.  
14 I can't grant on that, given the facts here.

15 I find on the basis of the evidence before me  
16 that the defendant would have pleaded in any event  
17 exactly as he did, whatever the judge told him about  
18 alternatives, and the error of the Court, therefore,  
19 in proposing alternatives that were not in fact  
20 available had no impact at all on the plea.

21 Under the circumstances this must be denied.

22 Any further findings of fact the petitioner  
23 wishes?

24 MR. KRANZ: No.

25 THE COURT: Any that the Attorney General



1  
2 wishes?

3 MR. BIRCH: No.

4 THE COURT: Submit an order within forty-  
5 eight hours. You have the right to appeal, and if  
6 you can't afford an attorney one can be appointed  
7 for you. You can consult your counsel on that.

8 Do you have any questions about what  
9 happened here?

10 THE WITNESS: No, your Honor.

11 THE COURT: Thank you very much.

12 MS. SILVERMAN: Forty-eight hours would be  
13 Sunday.

14 THE COURT: Forty-eight working hours.

15 MS. SILVERMAN: There would be no right for  
16 appeal. He would have to apply for a certificate.

17 THE COURT: You can apply for a certificate  
18 if you like.

19 MR. KRANZ: Thank you, your Honor.

20 (Time noted: 5:00 p.m.)  
21  
22  
23  
24  
25



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA ex rel. :  
VINCENT CAPUTO,

Petitioner, :

-against- :

ROBERT J. HENDERSON,  
Superintendent, Auburn  
Correctional Facility,

Respondent. :

ORDER

75 C 1614  
J.B.W.

-----X  
Petitioner VINCENT CAPUTO having made an application for a writ of habeas corpus and respondent Robert J. Henderson, Superintendent, Auburn Correctional Facility having opposed said application and said application having been argued on November 10, 1975 and evidentiary hearing having been held on December 5, 1975 and the petitioner having duly appeared by James J. McDonough, attorney in charge, Legal Aid Society of Nassau County, Criminal Division, Allen M. Kranz, of counsel and the respondent having appeared by LOUIS J. LEFKOWITZ, Attorney General of the State of New York, David L. Birch, Deputy Assistant Attorney General, of counsel and the order to show cause and the petition sworn to September 12, 1975 and the exhibits annexed thereto and the respondent's affidavit in opposition sworn to November 6, 1975 having been filed and read, it is

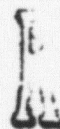


ORDERED AND ADJUDGED that the application for a writ  
of habeas corpus in all respects denied.

ORDERED AND ADJUDGED this 8th day of December, 1975.

JACK B. WEINSTEIN  
United States District Court  
Judge

Clerk of the Court



DEC 9 1975

LEGAL AID SOCIETY  
CRIMINAL DIVISION